NO. 83-1299

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

ANTHONY N. RODRIGUES,
Respondent,

vs.

KAREN H. KAHALEWAI and
LEROY KAHALEWAI,
PETITIONERS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

This matter involves no federal question. It arises out of a family dispute. All parties involved in these litigations are native Hawaiians (beneficiaries under the Hawaiian Homes Commission Act, 1920, as amended, Act of July 9, 1921, ch. 42, 42 Stat. 108, hereafter HHCA) except the Department of Hawaiian Home Lands.[1/]

1/ The Department of Hawaiian Home Lands is the state agency established to administer the provisions of the HHCA and is

In 1921, Congress enacted the HHCA which created the Hawaiian Homes Commission (HHC)[2/] and designated some 200,000 acres (the Hawaiian home lands) for the welfare and rehabilitation of native Hawaiians. The HHCA empowered the HHC to lease parcels of land within its jurisdiction to native Hawaiians at nominal rates.

The purpose of the HHCA is to rehabilitate native Hawaiians on Hawaiian home lands. In Re Aiona, 60 Haw. 487, 488, 591 P.2d 607 (1979). See also Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1218 (1978), cert. den. 444 U.S. 826 (1979); and N. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 865-66, 876-80 (1975).

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headed by the Hawaiian Homes Commission (Commission), now composed of eight members appointed by the governor with the advice and consent of the senate. See Hawaii Revised Statutes (HRS) §§ 26-4(13) and 26-17; and HHCA § 202(a).

2/ Upon admission, the HHC as then established was abolished and the DHHL formed to carry out its functions. HRS § 26-24.

With the admission of Hawaii into the Union in 1959, responsibility for the administration of the Hawaiian Home Lands was transferred to the state. The Hawaiian Admission Act, Pub. L. 86-3, 73 Stat. 5 (1959) conveyed the United States' title to the Hawaiian home lands to the state, at § 5(b), and requires Hawaii to hold these lands "as a public trust . . . for the betterment of the conditions of native Hawaiians . . . and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States," at § 5(f). See Keaukaha-Panaewa, supra, at 1218.

By the enactment of the HHCA, the federal government undertook "a trust obligation benefiting the aboriginal people" and the state has now assumed such fiduciary obligation. Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982). The Ninth Circuit similarly opined stating:

The Commission Act, as originally enacted, created certain benefits for native Hawaiians. It is clear, however, that for all practical purposes these benefits have lost their federal nature. Upon admission of Hawaii into the Union, the entire Commission Act program was turned over to the State of Hawaii. The United States conveyed its interest in the home lands (which are the subject of the Commission Act) to the state and these lands are now administered by state officials. The Commission Act itself was deleted from the United States Code and, at Congress' insistence, was adopted as a permanent fixture of the state's constitution. Thus, it is undisputable that the Commission Act program together with its rights and duties are, for all practical purposes, elements of Hawaiian law. (Emphasis added.)

Keaukaha-Panaewa, supra, at p. 1226.

Thus, as is clear from the foregoing, the HHCA is now state law and has been "adopted as a permanent fixture of the state's constitution." Hawaiian home lands are lands held in trust by the state for the benefit of native Hawaiians to be used in the manner and for the purposes specified in the HHCA.

The issue involved in this case is the proper construction of the HHCA provisions.

II. STATEMENT OF THE CASE

Charles Rodrigues (Charles), the lessee, was a holder of a Hawaiian home lands Lease No. 2367 (the lease) covering, inter alia, Lot 22, in Kalamaula, island of Molokai. On June 2, 1967, pursuant to HHCA § 209(1), Charles designated his 17 year old granddaughter Karen Kahalewai, nee Kahinu (Karen) as successor to the lease and the Commission approved such designation on July 28, 1967. Charles was then 66 or 67 years of age. Karen claimed that the designation was made pursuant to an agreement with Charles that she would look after him and maintain and care for Lot 22 and its improvements.

On May 9, 1970, Karen and Leroy Kahalewai (Leroy) were married in Honolulu. After the marriage, Karen returned to Molokai and was joined later by Leroy in August 1970.

Karen and Leroy (Petitioners) claim that Charles induced them to demolish the old house on Lot 22 and to build a new four-bedroom home. They acquiesced because

Charles assured them that Karen was the successor to the lease. Charles borrowed $18,000 from the Hawaiian Home Loan Fund for the purpose of replacing the house on Lot 22 as evidenced by Hawaiian Home Lands Contract of Loan No. 11328 dated April 4, 1972. The loan contract provided for interest at 7-1/2% per annum and repayment in monthly installments of $152. Leroy's signature appears on the loan contract, although it is not clear in what capacity he signed the document.

The new house on Lot 22 was completed in July 1972. Petitioners claim they have been repaying the loan at the rate of $152 each month.

On May 18, 1976, Charles designated Anthony Rodrigues (Anthony) as successor to the lease which was approved by the chairman of the Commission on August 3, 1976. Despite Karen's objections, the Commission ratified the chairman's approval on October 29, 1976.

On March 9, 1977, Petitioners filed a complaint in the First Circuit[3/] against Charles, Anthony, State of Hawaii and DHHL seeking to have the desigantion of Anthony as successor declared null and void or, in the alternative, to be awarded monetary damages (Civil No. 50956).

On March 31, 1977, DHHL and the State moved to dismiss as to them on the grounds that the complaint failed to state a claim upon which relief could be granted. DHHL contended that HHCA § 209(1) clearly

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3/ Pursuant to HRS § 603-1, the State is divided into four judicial circuits as follows:

§ 603-1 Judicial circuits. The State is divided into four judicial circuits as follows:

(1) The first judicial circuit is the island of Oahu and all other islands belonging to the State not hereinafter mentioned, and the district of Kalawao on the island of Molokai;
(2) The second judicial circuit includes the islands of Maui, Molokai (except the Kalawao district), Lanai, Kahoolawe, and Molokini;
(3) The third judicial circuit is the island of Hawaii;
(4) The fifth judicial circuit includes the island of Kauai and Niihau.

indicates that approval of a designation of successor is a ministerial act and thereunder the lessee has an absolute right to designate a successor and to change such designation at any time. Indeed it was further urged that if all the stated contingencies required under § 209(1) were met, approval was mandated by law and liability could attach for failure to perform in the prescribed manner.

On April 29, 1977, the First Circuit trial court entered its order granting DHHL's motion to dismiss.

On August 25, 1977, Charles filed a summary possession action in the District Court of the Second Circuit against Karen and Leroy. In defense, Petitioners claimed equitable title. The district court dismissed in view of its jurisdictional limitation when title to real estate comes into question.[4/]

4/ HRS § 604-5(e) provides as follows:

(e) The district courts shall not have cognizance of real actions, nor actions in which the title to real estate comes in

The matter was therefore refiled in the Second Circuit Court for further handling (Civil No. 3571).

On March 13, 1978, the Second Circuit trial court entered its order granting Charles' motion for summary judgment and dismissing Petitioners' counterclaim and on April 11, 1978 filed its judgment for possession in favor of Charles. Petitioners' motion for reconsideration and alternative motion for stay of execution was denied by the Second Circuit trial court on April 14, 1978 after which it issued a Writ of Possession on April 26, 1978. Petitioners appealed (Case No. 6978).

On May 25, 1979, the First Circuit trial court, in Civil No. 50596, entered its order granting Anthony's motion to dismiss or, in the alternative, for summary judgment and

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question, nor actions for libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction; nor shall they have power to appoint referees in any cause.

dismissed the complaint with prejudice as to Anthony.

Also on May 25, the First Circuit trial court entered its findings of fact, conclusions of law, and order granting Charles partial summary judgment concerning (1) the issue of Charles' "redesignation" of Anthony as his successor to the lease and (2) the issue that Petitioners had no interest in the lease. The order specified that the only issue left was whether Charles perpetrated fraud or misrepresentation upon Petitioners. After a bench trial, the trial court, in its findings of fact, conclusions of law, and order filed on October 23, 1979, dismissed Petitioners' claim based on fraud and undue influence, concluded that Charles was indebted to Petitioners on the theory of unjust enrichment, and permitted Petitioners to amend their complaint to conform to the evidence. Judgment was entered November 26, 1979 awarding Petitioners $12,616 against Charles. Petitioners appealed therefrom (Case No. 7781).

Charles died September 4, 1980[5/] and Anthony, pursuant to the last designation of Charles on May 18, 1976, approved by the Chairman of the Commission on August 3, 1976 and ratified by the Commission on October 29, 1976, succeeded to Charles' interest in Lease No. 2367 by operation of law.

In Case No. 7781, the State Intermediate Court of Appeals entered its opinion on August 4, 1983 affirming the actions of the First Circuit trial court. From a denial of their motion for reconsideration, Petitioners applied for writ of certiorari which was denied by the Hawaii Supreme Court September 7, 1983. Judgment was thereafter entered.

5/ Suggestion of death of Charles was filed in Case No. 6978 on August 14, 1981 and substitution of Anthony was approved and allowed on September 16, 1981. However, in Case No. 7781, though suggestion of death of Charles was filed November 25, 1981, there was no substitution for Charles in their appeal. However, counsel for Charles nonetheless filed an answering brief on February 25, 1982 and Anthony was a defendant-appellee in the case and also filed an answering brief.

In Case No. 6978, the State Supreme Court, in its Opinion rendered August 24, 1983, determined that the material facts in this case were identical to that set forth in the opinion of the Intermediate Court of Appeals filed August 4, 1983 and reported in 4 Haw. ____, Case No. 7781. Likewise, it determined the principal issue to be identical and agreed with the determination of the Intermediate Court of Appeals in Case No. 7781. A motion for reconsideration was filed on August 31, 1983 and denied by the State Supreme Court on September 14, 1983. On November 7, 1983, the Supreme Court entered its Judgment on Appeal affirming the judgment of possession entered by the Second Circuit Court in favor of Charles.

This petition for writ of certiorari ensued.

III. COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the State Intermediate Court of Appeals (Case No. 7781) and the State Supreme Court (Case No. 6978) err in determining that

under the HHCA provisions, a lessee has the absolute right to change at any time, the designated successor of his DHHL land lease to be effective upon the lessee's death?

Is there a federal question involved in the disposition of this case?

IV. REASONS FOR DISALLOWANCE OF THE WRIT

The State Intermediate Court of Appeals (Case No. 7781) and the State Supreme Court (Case No. 6978) did not err in determining that, under the HHCA provisions, the lessee has the absolute right to change the designated successor of his DHHL land lease to be effective upon the lessee's death.

There is no federal question involved in the disposition of this case.

V. ARGUMENT

A. Response to Petitioners Questions Presented.

i. There is no change of qualification of lessees as alleged.

Counsel for Petitioners first queries whether Sections 208(5) and 209(1) of the HHCA, as construed and applied by the Hawaii

Supreme Court, violate the compact between Hawaii and the United States that the qualifications of lessees shall not be changed except with the consent of the United States? Its sole argument is that "This case involves the qualifications of Karen and Leroy as successor lessees pursuant to their contracts with the lessee and the Hawaiian Homes Commission." (Page 27 of Petition.) (Emphasis added.)

Section 4 of the Admission Act provides in pertinent part as follows:

> Section 4. As a compact with the United States relating to the management and disposition of Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States, and in no other manner; provided, . . . (2) that any amendment to increase the benefits of lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States. . . .

Under the HHCA, only native Hawaiians as defined in Section 201(7) are eligible to participate in this homesteading program

designed by Congress to rehabilitate the aboriginal people. As previously noted, Charles, Karen, Leroy and Anthony are all native Hawaiians.

This case in no way seeks to change the qualifications of lessees. The only question was who was legally entitled to succeed to Charles' lease, Karen or Anthony. Based on the facts and the applicable provisions of the HHCA, it was properly determined that Anthony is the legal successor.

Section 209(1) provides that the lessee has the right to designate a person from among the enumerated list of qualified native Hawaiian relatives to whom his interest shall vest upon his death and reserves to the lessee the absolute right, at any time, to change his designation.

Charles, by his last designation submitted to and approved by the Commission, desired that Anthony be the successor to his lease. He reinforced his desire and intent by initiating summary possession proceedings to

evict Karen and Leroy from his homestead. That Charles repudiated his prior designation of Karen and any alleged contract had with Karen is evident by Charles' acts and deeds.

Thus, their contention is totally without merit.

ii. There is no governmental taking of any kind for any purpose in this suit.

Counsel for Petitioners queries whether the construction of the HHCA provisions resulted in a taking of private property without compensation in violation of the V Amendment. Counsel suggests at page 26 of his petition that "It also appears that property has been confiscated for a federal use, the alleged rehabilitation of the Hawaiian race."

Notwithstanding the inapplicability of the V Amendment, there is not involved in this case a governmental taking of any kind.

Charles designated Anthony as his successor to his lease. Upon his death,

Charles' interest in the lease passed to Anthony by operation of law.

That there is no governmental taking is obvious and this contention is wholely without merit.

iii. The construction of the HHCA provisions do not result in a violation of the 13th Amendment

A contract illegal because of statute does not render the service or performance executed thereunder slavery nor involuntary servitude.

Slavery suggests a condition whereby one person has the absolute power over the life, fortune and liberty of another. Involuntary servitude suggests a condition whereby one is subjected involuntarily to another person as his servant.

In this case the trial court essentially found that pursuant to Section 209(1) Charles had the absolute right to change his designation at any time, that Petitioners had no interest in the lease, and concluded that, on the theory of unjust enrichment, Petitioners

were entitled to judgment in the amount of $12,616.

The facts involved in this case make the contention that Petitioners were subjected to a condition of slavery or were servants of Charles ludicrous.

iv. Sections 208(5) and 209(1), as construed and applied effectuates the purpose and policy of the HHCA.

As more fully discussed hereafter, the court properly construed the provisions of Sections 208(5) and 209(1) and that construction is clearly consistent with the purposes and policies of the HHCA.

B. The Court Did Not Err In Determining That Under § 208(5) and 209(1) of the HHCA A Lessee Has The Absolute Right To Change At Any Time The Designated Successor Of His DHHL Land Lease To Be Effective Upon The Lessee's Death.

Subsection 1 of Section 209 of the Hawaiian Homes Commission Act, 1920, as amended, (Act of July 9, 1921, c. 42, 42 Stat. 108), hereafter "HHCA", reads in pertinent part as follows:

§ 209. [Successors to lessees.]. (1) Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers, and sisters, widows or widowers of the brothers and sisters, or nieces and nephews--the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands . . . provided, further, that such person or persons need not be twenty-one years of age. Such designation must be in writing, must be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named.

In the absence of such a designation as approved by the department, the department shall select from the relatives of the lessee in order named above as limited by the foregoing paragraph one or more persons who are qualified to be lessees of Hawaiian home lands, except as hereinabove provided, as the successor or successors of the lessee's interest in the tract or tracts, and upon the death of the lessee, his interest shall vest in the person or persons so selected. The department may select such a successor or successors after the death of the lessee, and the rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of such lessee. (Emphasis added.)

Upon examination of this subsection, it is clear that upon the death of the lessee, his interest in the tract or tracts and the improvements thereon "shall vest in the relatives of the decedent as provided in this paragaph." (Emphasis added.)

The subsection provides an enumerated list of relatives from among whom the lessee must designate the person or persons to whom he directs his interest in the tract to vest upon his death. The person so designated must be qualified to be a lessee of Hawaiian home lands. It is also clear from this subsection that such designation must be in writing, must be specified at the time of execution of the lease with a right in such lessee in similar manner to change such beneficiary at any time. It is required that such designation be filed with and approved by the department in order to be effective to vest such interests in the successor or successors so named.

This subsection provides also for the eventuality that the lessee does not so designate a successor. Should the lessee, while he is alive, fail to make such a designation approved by the department, the department is mandated "to select from the relatives of the lessee in order named" a successor to whom the lessee's interest shall vest upon the leseee's death. It is also provided that the "department may select such a successor or successors after the death of the lessee". (Emphasis added).

Only in the absence of a designation made by the lessee and approved by the department is the department authorized to designate a successor.

One can readily perceive the intent of Congress when it developed this plan of succession to a homestead lease. The lessee is given the absolute right to select his successor from among the enumerated list of qualified relatives. The lessee is also given the absolute right, at any time, to change his beneficiary.

On the other hand, only in the absence of such a designation, whether the lessee still lived or had died, is the department authorized to designate a successor. Even then, such selection is required to be "from the relatives of the lessee in order named above". (Emphasis added.) That is, while the lessee is free to select from among the list of enumerated relatives, the department's authority to select is limited to the enumerated list of qualified relatives and in the order named.

Petitioners, on the other hand, suggest in essence that this absolute right to designate a successor and to change such designation at any time, is subject to being contracted away under the provisions of subsection (5) of Section 208, HHCA.

Under the provisions of Section 208(5), a homestead lessee may, with the approval of the department, transfer, mortgage, pledge or otherwise hold his leasehold interest for the benefit of any native Hawaiian regardless of the relationship, if any, to the lessee.

Extended to its logical conclusion, a homestead lessee could circumvent the provisions of Section 209(1) by contracting to devise his leasehold interest. Such a construction does not appear to be in keeping with Congress' intent.

On July 9, 1921, Congress enacted the Hawaiian Homes Commission Act, 1920 (Ch. 42, 42 Stat. 108). It is generally acknowledged that the primary purpose of the HHCA was the rehabilitation of native Hawaiians. The Committee on the Territories described in part the general policy underlying the bill for the enactment of the HHCA in these words.

> Your committee is . . . of the opinion that (1) the Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible; (3) accessible water in adequate amounts must be provided for all tracts; (4) the Hawaiian must be financially aided until his farming operations are well underway. In framing such a program your committee is in a general way following the broad outlines of Senator Wise's plan.

H.R. Re. No. 839, 66th Cong., 2d Sess. 4 (1920).

Congress, under the HHCA, designated 203,500 acres, more or less, of public lands for the Hawaiian rehabilitation prograr. These lands were placed under the jurisdiction and control of a board known as the Hawaiian Homes Commission.

The Commission was authorized to lease to native Hawaiians tracts of land for a term of ninety-nine years with a nominal rental of one dollar a year. HHCA § 207. Each such lease was subject to the conditions imposed by HHCA § 208. In order to assist the homesteader, the Commission was authorized to make loans to the lessee (HHCA § 213) and to employ agricultural experts to assist the lessees in obtaining maximum utilization of the leased lands. (HHCA § 219).

For violation of any of the conditions of the lease or conditions of loan, the Commission was authorized, after due notice and an opportunity to be heard, to declare the lessee's interest in the tract and all improvements thereon to be forfeited and the

lease cancelled. (HHCA §§ 210, 216.) The Commission was authorized to seek the aid of the circuit court to enforce its judgment (HHCA § 217).

Under the provisions of the original HHCA, the homestead lessee was without authorization to designate a successor. Instead, upon his death, the homestead would descend as provided for by statute. Section 208(5) originally provided as follows:

> (5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for any benefit of, any other person, except a native Hawaiian, and then only upon the approval of the commission, or agree so to transfer, mortgage or pledge, or otherwise hold his interest in the tract. Such interest shall not, except in pursuance of a transfer, mortgage or pledge to or holding for or agreement with a native Hawaiian, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon. Upon the death of the lessee his interest in the tract and improvements thereon shall vest under the limitations provided for homesteads in section 403 of the Revised Laws of Hawaii of 1915; . . . . (Emphasis added.)

Section 403, Revised Laws of Hawaii of 1915, provided in pertinent part:

Sec. 403. Not devised; descends to whom. In case of the death of any occupier or lessee, all the interest of such occupier or lessee, any conveyance, devise or bequest to the contrary notwithstanding in land held by such decedent by virtue of a certificate of occupation or a homestead lease shall vest in the relations of the decedent as follows: . . . (Emphasis added.)

Under the original HHCA, Section 208(5) governed the method of descent of the homestead. Under the referenced statute contained in Section 208(5), the homestead lessee was without authority to designate a successor. See Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 863 to 864 (1975), for discussion re Land Act of 1895.

Section 209 of the original HHCA, provided in its entirety as follows:

Sec. 209. All successors, whether by agreement or process of law, to the interest of the lessee in any tract, shall be deemed to receive such interest subject to the conditions which would rest upon the lessee, if he then were the party holding the interest in the tract. Provided, That a successor receiving such interest by inheritance shall not, during the two years following his inheritance, be deemed to have violated any of the conditions enumerated in section 208 of this title, even though he is not a native Hawaiian and does not on his own behalf occupy and use or cultivate the tract as a home or farm for such part of the year as the commission requires in accordance with the

regulations prescribed by it under paragraph (4) of section 208 of this title.

Thus, under the provisions of Section 208(5) as originally enacted, the homestead lessee could mortgage, pledge or otherwise hold his interest in the leasehold to another native Hawaiian. However, it is quite apparent that he could not contract to devise his leasehold interest to another since he had no power or right to designate a successor.

For a period of 16 years, there existed this statutory ban on testamentary disposition. Congress, by Pub. No. 200 (Act of July 10, 1937, 50 Stat. 497 et seq. at 504) amended, inter alia, Section 208(5) and 209. Since that amendment, Section 208(5) has remained unchanged except for the substitution of the word "department" wherever "commission" appeared pursuant to Act 207, Session Laws of Hawaii 1963.

Section 209, as amended in 1937 now authorized to some degree, the lessee to designate a successor to his leasehold interst. It provided in pertinent part:

A lessee shall furnish the Commission, in writing, the name or names of such person or persons being qualified native Hawaiian or Hawaiians, within the limits prescribed in the following sequence of succession, to whom he wishes his interest in the lease to be transferred after his death, this designation to be subject to the approval of the Commission: (1) In the widow or widower; (2) if there is no widow or widower, then in the children; (3) if there are no children, then in the widows or widowers of the children, (4) if there are no such widows or widowers, then in the grandchildren; (5) if there are no grandchildren, then in the brothers and sisters; (6) if there are no brothers or sisters, then in the widows or widowers of the brothers and sisters; (7) if there are no such widows or widowers of the brothers or sisters, then in the nephews and nieces.

In the absence of such designation the Commission shall choose a qualified native Hawaiian or Hawaiians in accordance with the foregoing sequence, either individually or collectively, except that such successor or successors need not be twenty-one years of age.

In explaining the changes, the Committee on Territories stated:

The purpose of this bill is to make various changes in the Hawaiian Homes Commission Act of 1920. The amendments are the result of nearly 2 years of study and discussion of the Hawaiian homes project as in operation under existing law by the recently reorganized Hawaiian Homes Commission, and a hold-over committee of the Legislature of Hawaii, and was adopted by the legislture at its regular biennial session in 1937, and approved by the Governor.

* * * * *

Amendments to section 208 provide the method of handling liens on leases made by the Commission and authorize the Commission to advance taxes due by the homesteaders.

Amendments to section 209 prescribe a clear-cut policy concerning the succession of the interests of deceased homesteaders in their leaseholds which has not heretofore been done. (Emphasis added.)

S.R. No. 778, 75th Cong., 1st Sess. 1-2, (1937).

While the lessee was now authorized to designate a successor, he could only do so in the prescribed sequence of succession.

Four years later, by Public Law 325 (Act of November 26, 1941, C. 544 55 Stat. 762 et seq.) that Congress again amended Section 209. The Committee on Territories recommended passage of the proposed measure with certain amendments. The report stated in pertinent part, as follows:

The amendments are as follows:

Page 3, line 5 change the word "relations" to "relatives", to accord with the phraseology used in other parts of the bill.

Page 3, line 20, after the word "writing," insert the following language: "must be specified at the time of execution of such lease, with a right in such lessee in similar

manner to change such beneficiary at any time, and shall be".

The purpose of this bill is to make various changes in the Hawaiian Homes Commission Act of 1920, as shown by experience to be needed. (Emphasis added.)

S.R. No. 822, 77th Cong., 1st Sess. 1 (1941).

As amended in 1941, Section 209(1) has remained virtually unchanged. Throughout the provisions of subsection (1), Congress has used the word "shall" and "must" and in one instance the word "may" is found. Recognizing the caveat expressed in Endo v. Lear Siegler, Inc., 59 Haw. 612, 585 P 2d 1265 (1978) that the word "shall" in a statute is not dispositive of the issue of whether the statute is mandatory rather than directory, it nonetheless appears clear both from the reading of the statute as well as its history, that the provisions thereof are mandatory.

It seems clear Congress intended a separate, concise and exclusive method of succession of homestead leases under Section

209 of the HHCA. Under the terms of Section 208(5) as originally enacted, it is clear that a contract to devise would be void.[6/] And, as amended in 1937 and 1941, Section 209(1) clearly mandates the method of succession.

Contrary to the suggestion of Petitioners, the decisions of the courts display no indication of "localism" or "provincialism." The considered decisions reflect a true

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6/ Regarding this aspect, the House Committee on Territories stated in part:

> . . . The Hawaiian home lands are placed under the control of the commission to be used and disposed of for the purpose of aiding native Hawaiians. (See Sec. 204.) . . . The title to these lands, as is true of all public lands of the Territory, remains in the United States. (See Sections 207 and 208.) . . . Upon the death of the lessee his lands may not be willed but must descend within his family as provided by the existing laws of the Territory relating to homesteads. . . .

HR. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920).

appreciation of the purposes and policies of the HHCA, and properly concluded that a pr vate agreement (such as the alleged oral agreement involved herein) could not alter the "clear and plain" import of its provisions.

C. There Is No Federal Question Involved In This Case

For the reasons noted in the foregoing, it appears obvious no federal question is involved in these cases.

Petitioners contend they had a contract, performed thereunder, and therefore are entitled to exact the agreed upon performance in exchange. Upon the repudiation of the alleged contract by Charles, they recognized and apparently accepted the repudiation and elected to sue for specific performance, or in the alternative for damages apparently on the theory of an anticipatory breach of the alleged oral contract to devise. They pursued their remedy and obtained a judgment in the amount of $12,216 against Charles.

Notwithstanding their election, they persist in their argument that the construction by the courts of Sections 208(5) and 209(1) renders their contractual rights unenforceable, thus resulting in the deprivation of their constitutional due process rights under the 5th and 14th Amendments. They further suggest that as a result of their inability to enforce their contract, the services rendered thereunder reduced them to the status of involuntary servants and peons in violation of the 13th Amendment.

Such contentions are without merit. It presumes the existence of a valid contract. Here, since the alleged agreement was in contravention of law, there was no enforceable contract. Even assuming the existence of a valid contract, their argument seems to suggest no statute may deprive them of the right to enforce the contract. If such statute does, then that statute violates their 5th and 14th Amendments due process

rights and renders the service performed done under a condition of involuntary servitude or peonage. Such contention, if accepted, would almost assuredly, and singlehandedly, negate the various statutes of limitations, statutes of fraud, statutes regulating licensing of businesses, professions, and the like. These statutes, for the reasons underlying their enactment, proscribe the enforcement of contracts made in contravention thereof.

Clearly, the contention of Petitioners are without merit and, more importantly, raise no federal questions.

V. CONCLUSION

This court should deny the petition for writ of certiorari because this matter essentially involves a state matter and interpretation of state laws and involves no federal interest or question. The decisions of the Hawaii Supreme Court and the Hawaii

Intermediate Court of Appeals are clearly in keeping with sound judicial principles of law.

DATED: Honolulu, Hawaii, April 19, 1984.

Respectfully submitted,

TANY S. HONG
Attorney General
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CERTIFICATE OF SERVICE

I, Edwin P. Watson, hereby certify that on this 21st day of April 1984, three copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, postage prepaid, to the following Counsels:

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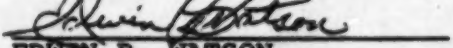
I further certify that all parties required to be served have been served.



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